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SUBJECT: AUSTRIAN COURTS ORDER AGAINST HAGUE RETURN TO HUNGARY

REF: PHILLIPS/CI EMAIL OF FEB 11, 2005

1. SUMMARY: In July 2004 Austrian courts ordered against the return of a child to her father in Hungary. According to Supreme Court documents, the mother wrongfully retained the child in Austria when she failed to return the child after a scheduled summer visitation in 2003. In conversations with the judge, the girl stated that her father hit her almost daily, that she was afraid of him, and that she would rather live with her mother in Austria. The courts determined that the nine-and-a-half year old girl was old enough for her opinion to be taken into consideration, citing the "age of maturity" clause in Article 13 of the Hague Convention. Interestingly, the courts did not cite Article 13B, grave risk, in reaching this decision. They also reached their decision with unusual promptness. END SUMMARY.

2. The girl was born in Hungary on October 11, 1994. Her parents divorced in 2000. Hungarian courts awarded the father sole custody, but in 2002 the parents agreed the mother would have visitation in Austria. In June 2003 the mother took the child to Austria but did not return the child in July as expected. Instead the mother attempted to file for full custody of the child through a Hungarian City Court. The Hungarian City Court denied the mother's application for custody and ordered her to return the child within eight days. The mother then applied for custody of the child through the Austrian Lower Court on September 25, 2003.

3. On October 29, 2003 the father filed for return under the Hague Convention. In the course of the proceedings, the girl told a child psychologist and a social worker that she was afraid of her father, that he hit her almost daily, and that she did not want to live with him. The Austrian Lower Court rejected the father's application for return, citing Article 13 of the Convention, which provides for denial of the return if the child objects.

4. The Austrian Appeals Court supported the Lower Court's decision, arguing that, at the age of nine-and-a-half, the child was old enough to have her opinion taken into consideration. The Appeals Court based this decision on a prior Austrian Supreme Court case from 1992, which had deemed a 10-year old boy mature enough to voice his opinion in court, per Article 13 of the Convention. The Supreme Court, citing that the 1992 decision was still relevant and applicable, subsequently refused to hear the case because there had been no procedural flaws in the Appeals court decision.

5. EMBASSY COMMENT: Austrian law has always provided that, in custody cases, the courts could take a child's opinion into consideration once the child has reached age 10. However, this ruling lowers the bar somewhat for Hague cases. It is interesting to note that the court did not refer to Article 13B's provision on "grave risk". This suggests that the courts have learned not to cite this section of the Convention simply because of a child's integration into his/her new environment. It is also interesting to note that the entire legal process took less than a year from initial filing to final appeal. This is considerably less than Hague cases we have followed in the past. END COMMENT.

BROWN